BERJAYA LAND BHD

v.

WONG CHEE HIE & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[CIVIL SUIT NO: D-22NCC-929-2010]
17 MARCH 2011

CIVIL PROCEDURE: *Subpoena - Setting aside - Subpoena Ad Testificandum - Compelling solicitor to testify at trial - Whether solicitor material witness for just decision of case - Whether proper course would be for subpoenaed witness to invoke s. 126 Evidence Act 1950 at trial - Whether issuance of subpoena effected to oppress - Whether application to set aside subpoena dismissed*

EVIDENCE: *Privilege - Legal professional privilege - Solicitor subpoenaed to testify at trial - Whether solicitor material witness for just decision of case - Whether proper course would be for subpoenaed witness to invoke s. 126 Evidence Act 1950 at trial*

This was an application by the plaintiff to set aside a writ of subpoena ad testificandum and duces tecum seeking to compel one Woon Huei Chin, an advocate and solicitor ('the solicitor') to testify at the trial of this matter, at the behest of the defendants. Briefly, the facts were that the plaintiff found its action against the defendants due to a breach of confidentiality, seeking, *inter alia*, an order that the defendants be restrained from disclosing the plaintiff's confidential information in a series of emails. For the purpose of this application, only the second email was relevant as the solicitor was sought to be subpoenaed in relation to its contents. The defendants opposed the plaintiff's application to set aside the subpoena, contending that the solicitor was an important and material witness, and that they required the presence of the solicitor to explain the contents of the second email, and more significantly, to enable a determination of the issue of whether the legal advice in the second email was in furtherance of an illegal purpose. The plaintiffs, however, maintained that (i) the witness was not a material witness for the just decision of this case; (ii) the witness, being an advocate and solicitor was neither compellable, nor a competent witness by reason of the prohibition (or privilege afforded to solicitor-client communications) under

A s. 126 of the Evidence Act 1950 ('EA') and (iii) the proviso to s. 126 was inapplicable because there was no evidence of a furtherance of an illegal purpose.

Held (dismissing the application to set aside subpoena):

B **(1)** The most appropriate course to adopt would be for the solicitor to attend as a witness pursuant to the subpoena and to invoke the privilege under s. 126 of the EA at that stage. It would then be open for the parties to take up the arguments set out and for the court to make a determination C then. The court might will allow or disallow certain questions in order that it may determine the legality or otherwise of the second email. The court would then be in a position to make a ruling on the matter more fully. Thus, the solicitor was the material witness for the purposes of the determination of this D issue. As such, the materiality requirement as set out in *Wong Sin Chong v. Bhagwan Singh* was satisfied. (paras 35 & 37)

(2) Section 126 EA envisages the taking up of the issue legal privilege at or during trial. It is not an issue that is normally E litigated or dealt with on affidavit evidence (s. 2 EA). If the court were to make a finding that the proviso was inapplicable on the basis of affidavits, the court would be effectively conducting a mini-trial on affidavit evidence, which flouts the EA. The proper course would be for the subpoenaed witness F to invoke the privilege afforded by the section at trial. (*Dato' Anthony See Teow Guan v. See Teow Chuan & Anor*) (para 37)

(3) If the court were to allow this application to set aside the subpoena, the court would effectively be adjudicating on the G issue of the proviso prior to trial. Certainly in so far as the second email was concerned, there would be nothing left to be adjudicated at trial. This too would amount to a breach of natural justice. In view of the fact that the evidence of the solicitor would be material *vis a vis* the second email, it could H not be concluded that the issuance of the subpoena was effected to oppress. Neither could it be viewed as an abuse which needed to be prohibited. (para 37)

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Case(s) referred to:

Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***

Ismail v. Hasnul & Another Appeal [1967] 1 LNS 60 FC ***(refd)***

Lord Ashburton v. Pape [1913] 2 Ch 469 ***(refd)***

Ong Jane Rebecca v. Lim Lie Hoa and Others [2003] 1 SLR 457 ***(refd)***

PP v. N Vengadasalam & Ors [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893 HC ***(dist)***

Senja Cerah Sdn Bhd v. Sisprop Sdn Bhd; Tan Sri Cheng Heng Jem & Ors (Applicants) [2009] 7 CLJ 256 HC ***(foll)***

Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 4 CLJ 345 SC ***(dist)***

Legislation referred to:

Evidence Act 1950, ss. 2, 126, 127, 128, 129

Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Nitin Nadkarni (CL Foong with her); M/s Lee Hishamuddin Allen & Gledhill

For the defendant - Kanmani Muthayah; M/s Megat Najmuddin Leong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan J:

Introduction

[1] This is an application by the plaintiff to set aside a writ of *subpoena ad testificandum* and *duces tecum* dated 26 November 2010 seeking to compel one Woon Huei Chin, an advocate and solicitor ('the solicitor') to testify at the trial of this matter, at the behest of the defendants. The defendants oppose this application to set aside the subpoena, contending that the solicitor is an important and material witness, whom the defendants require to testify, in order that a just decision in this case is arrived at.

The Claim

[2] The plaintiff found its action against the defendants in breach of confidentiality, seeking, *inter alia*, an order that the defendants be restrained from disclosing the plaintiff's confidential information in a series of emails. In their pleadings, the parties have categorised these emails in the following manner:

A (1) A series of emails which consist of an email from one Foo Toon Kee to Joseph K. Won dated 14 September 2000 entitled "RE: Cash Flow@ Sept '09" – the 1st email;

(2) An email from the solicitor to one Derek Chin dated
B 25 November 2009 entitled "RE: Piccolo Hotel – CF – Bomba Inspection" – the 2nd email;

(3) A series of emails which comprise an email from Foo Toon Kee to Puvanes dated 28 December 2009 entitled "RE: TTG Asia: Request for an update on Piccolo Hotel Kuala Lumpur"
C – the 3rd email.

[3] For the purposes of this application, only the 2nd email is relevant as the solicitor is sought to be subpoenaed in relation to its contents. In essence the defendants maintain that they require
D the presence of the solicitor to explain the contents of the 2nd email, and more significantly, to enable a determination of the issue of whether the legal advice in the 2nd email is in furtherance of an illegal purpose.

E **[4]** The plaintiffs maintain that:

(a) the witness is not a material witness for the just decision of this case,

(b) the witness, being an advocate and solicitor is neither
F compellable, nor a competent witness by reason of the prohibition (or privilege afforded to solicitor-client communications) under s. 126 of the Evidence Act 1950.

(c) The proviso to s. 126 is inapplicable because there is no
G evidence of a furtherance of an illegal purpose.

Background

[5] By way of background, it is relevant that the current suit is the third in a series of suits between the parties. The plaintiff and
H the defendants had been involved in a dispute regarding management control of one Absolute Prestige Sdn. Bhd. ('APSB'), which owns and operates a hotel known as 'The Piccolo Hotel'. I shall not set out the background facts relating to this corporate dispute because they comprise the subject matter of the earlier
I suits and are not strictly relevant for the purposes of this

application (or even the action). The two suits initiated in this context by the defendants were D-22NCC-83-2009 and S22-21-2010. The first suit was dismissed with costs and the second suit was struck out under O. 18 r. 19.

[6] In the course of the second suit, the three emails comprising the subject matter of this suit surfaced, as exhibits in an affidavit filed on behalf of the defendants. The plaintiff claimed that the emails were unlawfully obtained, used and disseminated as the contents of the emails are confidential in nature as well as being privileged. This suit was then initiated seeking, *inter alia*, an injunction to restrain the further disclosure, use or dissemination of the emails, as well as damages. An interim injunction to this effect was granted on 3 September 2010.

The Law Relating To The Setting Aside Of Subpoenas

[7] The leading case in relation to this issue is *Wong Sin Chong & Anor. v. Bhagwan Singh & Anor.* [1993] 4 CLJ 345 where the Supreme Court held, *inter alia* that:

> ... The right of a party to the attendance of witnesses is a crucial part of our judicial system but the right must be protected against any oppression or abuse. Thus in *Raymond v. Tapson* [1993] 22 Ch D 430 it was held that any party may without leave of the Court, issue a subpoena for the examination of a witness at any stage of an action; but the Court will exercise a control over the privilege to prevent it being oppressively used. ...
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> At p. 452, *Mallal's Supreme Court Practice* 2nd Edn., citing *Raymond v. Tapson (ante)* as authority, it is stated that:
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> An oppressive subpoena (for the purposes of annoyance, or in spite, to a man's wife or unmarried daughters and the like) will be set aside by the court, on application on behalf of the witness, as being an abuse of the party's privilege to issue a subpoena without leave.
>
> It is further stated at page 453 that:
>
> The court has inherent jurisdiction to set aside a subpoena which is issued from an improper motive and not for obtaining relevant evidence, and there is no distinction, on the point between civil and criminal proceedings ...

[8] Citing Lim Beng Choon J in *PP v. N Vengadasalam & Ors.* [1990] 1 CLJ 810; [1990] 2 CLJ (Rep) 893, the Supreme Court went on to hold that in every case the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting. It must be pointed out that in this case, the solicitor who is the author of the 2nd email is not counsel in this matter, an issue which was touched upon and considered by Varghese George JC, who heard a prior application in this action to prohibit the firm of Messrs Lee Hishamuddin Allen Gledhill ('LHAG') from acting for the plaintiff on the grounds that the solicitor and two of the firm's other solicitors were so inextricably involved in the factual matrix of the instant corporate dispute, as to warrant their being called as witnesses at trial. Accordingly it was contended that such a possibility gave rise to a conflict of interest, as a consequence of which the firm should cease to act for the plaintiff. This application was dismissed by the learned Judicial Commissioner. As matters stand therefore, the firm continues to act for the plaintiff, but the solicitor does not appear as counsel in this matter.

[9] In the context of the law, therefore, it is incumbent upon the defendants, who seek to subpoena the solicitor, to satisfy the court on balance, of the materiality of the evidence of the solicitor as a witness. It is relevant that unlike the situation in *Wong Sin Chong v. Bhagwan Singh* (above) as well as *PP v. Vengadasalam*, the plaintiff will not be deprived of representation even if the solicitor is called to testify.

[10] In *Senja Cerah Sdn. Bhd. v. Sisprop Sdn. Bhd.; Tan Sri Cheng Heng Jem & Ors (Applicants)* [2009] 7 CLJ 256 Mohd Hishamudin J (now JCA) cited *Wong Sin Chong v. Bhagwan Singh* (above), reiterating the applicability of the test outlined above by Mohd Azmi SCJ, and went on to consider and analyse the issues arising for consideration in that matter at trial. His Lordship concluded:

> ... It is, however, true that all the three applicants, namely Tan Sri William Cheng, Cheng Yong Liang and Chareon, in their respective affidavits, have denied the allegations made by the defendant in their affidavits. But as to whose evidence is to be accepted, this is a matter to be determined at the trial. I do not think that it is the law that I must at this stage of the proceeding deny the defendant the issuance of the subpoenas just because of

> the applicants' denials; nor do I in the present inquiry need to be convinced of the truth of the averments in the defendant's affidavits on a balance of probabilities in deciding whether or not I ought to set aside the subpoenas. As long as I am satisfied – and that is the case here – that the applications for the subpoenas are made *bona fide*, that there is some credibility in the defendant's affidavit evidence in relation to the materiality of the proposed witnesses, and that the triable issues have been raised by the defendant by their affidavits, I ought not as a matter of law set aside the subpoenas that had already been issued and served ...

[11] I respectfully adopt the foregoing mode of analysis as the proper methodology to be undertaken by this court in determining whether or not to set aside the subpoenas issued against the solicitor.

[12] In *Ong Jane Rebecca v. Lim Lie Hoa and Others* [2003] 1 SLR 457, a decision of the Singapore High Court, Choo Han Teck JC held as follows in an appeal seeking to set aside a subpoena:

> ... The subpoena should obviously not be used frivolously or in a scandalous manner, that is to say, to cause to be issued indiscriminately without any basis or reason so as to embarrass or inconvenience the person subpoenaed. Such occasions have been extremely rare, in my experience. On the present facts, I see no need to make any further qualifications or rules judicially by way of guidelines in the use of the subpoena. In my view, persons who have been served with a subpoena ought not to take a separate application to put the issuing party to justify the issuance of the subpoena except in the clearest cases.
>
> In the present case, Mr. Tay was the partner in charge of the file at Arthur Andersen at the material time ... The file was then handed over to Mr. Tam. On this fact alone, the second defendant was justified in calling Mr. Tay to testify at the inquiry. There is evidence on the face of the record, namely the affidavit of Mr. Tay filed, confirming this fact and his previous affidavits producing copies of the accounts of the Estate, to justify his attendance in court. In the end, his oral evidence may not be of much benefit to any party but the same can be said of many a witness. The ultimate value of the witness is not the gauge to determine whether he ought to be subpoenaed ...

[13] In *Ismail v. Hasnul & Another Appeal* [1967] 1 LNS 60 Raja Azlan Shah FCJ (as His Royal Highness then was) stated, in setting aside subpoenas which the court held, on appeal, as seeking evidence having no connection with the main fact in the defamation suit:

> ... The practice in all courts has been that a subpoena may be issued against anybody, be he a Minister of the Government or a nonentity. It cannot be gainsaid that a Minister has any more privilege than that enjoyed by a member of the public. Injustice will arise if equals are treated unequally. But the court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse.

[14] Again it is reiterated that the issuance of a subpoena is an integral part of the administration of justice and a privilege allowed to all, only being restrained where the evidence sought to be adduced is not material and where the issuance of such a subpoena would amount to an abuse or oppression.

[15] The foregoing cases set out the position in law in relation to the setting aside of subpoenas. It is evident that the prevailing principle is that materiality is key, and that the court will exercise its inherent jurisdiction to set aside a subpoena where it has been issued with a collateral purpose and therefore amounts to an abuse or is oppressive. It is now necessary to consider the issues of materiality and whether, in the context of the factual matrix of this case, the issuance of a subpoena against the solicitor is in fact premised on the basis that she is a material witness at trial whose presence and evidence is necessary. Additionally this court will have to consider whether the issuance of a subpoena amounts in the current context to an abuse, or is oppressive.

[16] In order to arrive at a decision on the two matters outlined above, it will be necessary firstly, to ascertain the issues that will be relevant at trial. This can be ascertained by a consideration of the pleadings. From an analysis of the pleadings, the issues to be adjudicated upon will emerge. If the issues to be adjudicated upon require the evidence of the solicitor, then she would comprise a material witness. If her evidence is not necessary or essential, then materiality would not be established.

[17] A consideration of the pleadings would also allow an assessment of whether the application is made with the collateral purpose of seeking to oppress the witness by requiring her presence at trial. Again, if her evidence is not directly relevant, or cannot be given for reasons of privilege or otherwise, then this again would be a consideration in ascertaining whether or not the subpoena should be set aside.

The Pleadings

[18] In their statement of claim in relation to the 2nd email (which is the relevant email in respect of this application) the plaintiff pleads that it is the owner of the confidential information contained therein. It stipulates that it is an advice given by the plaintiff's solicitors to the plaintiff and was issued to nine recipients. The plaintiff further pleads that the 2nd email discusses, *inter alia*, the strategy and plan to regularise the corporate affairs of APSB and advice on available cause of actions relating to the plaintiffs' dispute with the defendants. The plaintiff concludes by pleading that the 2nd email is confidential and privileged in view of it being advice from its solicitors. Thereafter the plaintiff details the wrongful use of what it contends is its confidential information by the defendants, unlawfully, on various occasions, resulting in detriment to the plaintiff. The claim culminates with a prayer for a permanent injunction, delivery up and damages.

[19] The defendants, in their defence, respond to the allegations made by the plaintiff in the claim in respect of the background facts. More particularly, in relation to the emails comprising the subject matter of this claim, the defendants deny that these emails are confidential in character, or are of a nature or of a kind, as to entitle the plaintiff to the protection of this court. With respect to the 2nd email, the defendants plead that as it was sent by the witness to ten persons other than the addressee, not all of whom are directors of APSB or one Sinar Merdu Sdn Bhd, this email is not confidential in nature. Additionally it is contended that the 2nd email contains a series of action plans by which the witness, the plaintiff and nine others were planning to take full control of APSB. Finally it is contended that the 2nd email is an advice given by the witness, a solicitor, in furtherance of an illegal purpose. There are various other averments in the rest of the defence which I shall not set out as they are not directly relevant to the

application here. By way of reply to the defence, the plaintiff denies the foregoing, save and except that the 2nd email was sent by the witness.

Issues

[20] From the pleadings it is evident that the plaintiff asserts its claim to confidentiality on the basis that the 2nd email, being a communication between a solicitor and client, is privileged, and that it thereby comprises confidential information. In *Lord Ashburton v. Pape* [1913] 2 Ch 469, Swinfen Eady LJ stated:

> ... The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged ...

[21] The fact that a solicitor client communication/advice is privileged and is not to be divulged by the solicitor without the client's consent imparts the requirement of 'confidentiality' which justifies the protection of the court. The privilege that is accorded to such communications is statutorily encoded in s. 126 (to 129) of the Evidence Act 1950 ('EA'). Section 126 of the EA provides as follows:

> (1) **No advocate shall at any time be permitted, unless with his client's express consent,** to disclose any communication made to him in the cause and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or **to disclose any advice given by him to his client in the course and for the purpose of such employment:**
>
> **Provided that nothing in this section shall protect from disclosure:**
>
> (a) **Any such communication made in furtherance of any illegal purpose;**
>
> (b) Any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client. (emphasis added)

[22] The defendant on the other hand refutes this claim of confidentiality premised on privilege, contending that the client is not entitled to the protection of such privilege because the 2nd email was made in furtherance of an illegal purpose. There are no particulars specified of the illegal purpose, but based on the pleadings read as a whole, more particularly in relation to email 1, the defendants refer to a series of action plans to take control of APSB including, in relation to email 1, a 'hostile take-over incident of the Piccolo Hotel by the plaintiff and nine others which was done illegally on 30 November 2009 was spelt out in the said emails.'

[23] In so far as this court is concerned therefore one of the issues to be determined by this court at trial will be whether the privilege prevails, or is lifted by reason of the communication having been made for an illegal purpose. Two matters arise for consideration here. They are:

(i) Was the communication issued in furtherance of an illegal purpose?

(ii) Who is the material witness to assist the court to ascertain this issue?

[24] The issue of whether the communication was issued in furtherance of an illegal purpose requires a consideration of the contents of the email.

[25] It also needs to be considered whether this court should or can, at this interlocutory stage, determine this issue summarily rather than at trial. The defendants submit that there are parts of the email that require explanation so that the court can ascertain the issue of whether or not the communication was made in furtherance of an illegal purpose. They point to specific phrases which have to be read in the context of the entire mail but which I reproduce here for ease of reference:

> ... In dismissing Piccolo's OS earlier, the Judge had expressed the view that he expects another round of litigation. You can either launch it or you can force about a new set of facts that will give you the upper hand in the next round. Once you are in control that would be the *status quo* when a new suit and/or a new injunction is launched by Piccolo. At the moment there is no injunction to restrain you from displacing SW.
>
> ...
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> In the final analysis, it may appear that the better strategy is to take control first, choke Piccolo/SW and force them to sell out or do a capital increase or rights issue exercise. At this stage, there is no injunction to prevent Sinar from taking all of the above steps.

[26] In its defence the defendant is contending that the foregoing email shows an illegal purpose, more particularly in the use of the words 'choke out' and to 'force a new set of facts' so as to procure an 'upper hand'. This they seek to link with the particulars set out in respect of the 1st email relating to a hostile take over on 30 November 2009 which they contend was carried out illegally.

[27] The plaintiff on the other hand explains the entirety of the 2nd email as comprising a strategy for the plaintiff to take management control of APSB and the Piccolo Hotel. This they maintain is a matter of legal advice and strategy and the use of the words highlighted by the defence in no way alters the advice to that in furtherance of an illegal purpose. They query the nature of the 'illegal purpose' maintaining that the defendants have pleaded neither fraud nor any crime warranting a lifting of the privilege which clearly exists.

[28] As such the issue before the court is whether or not the privilege and thereby confidentiality that exists in respect of solicitor-client communications is lifted by reason of an illegal purpose. In order to decide whether the purpose is illegal or otherwise, is it permissible for this court to determine that issue on a perusal of the 2nd email and on the basis of the affidavits and submissions filed by the parties? Is the court to make a determination of whether or not the 2nd email was made or written in furtherance of an illegal purpose at this interlocutory stage in a summary fashion on the basis of conflicting affidavits?

[29] If the current application to set aside the subpoena did not fall to be determined, the issue of whether or not the communication was written in furtherance of an illegal purpose would be determined in the normal course of events at trial. The subject witness would attend and assert the right not to reply to questions pertaining to the 2nd email on the grounds of privilege under s. 126 whereupon the court would then hear arguments and make a determination at trial. Should the court embark upon this exercise at this stage?

[30] A further concern that arises is that if this court determines that the subpoena should be set aside, this will deprive the defendants of their sole defence in respect of the 2nd email without their having been heard.

[31] In other words, it would appear to amount to a breach of natural justice to deprive the defendants of the right to call a witness to testify on a document on which their entire defence hinges. The issue of the furtherance of an illegal purpose is the entirety of the defence available to the defendants. If they fail to show that the communication was in furtherance of an illegal purpose, then they do not succeed in invoking the proviso, in which event the privilege attaches. In such an event it will follow that the 2nd email is privileged and thereby confidential, warranting the protection of this court. If however the communication is indeed in furtherance of an illegal purpose then the privilege no longer attaches and the communication would not have the nature or quality of confidentiality required to warrant the protection of this court.

[32] The plaintiff meets this argument by contending that it is evident from a *prima facie* reading of the 2nd email that it is not illegal, and could not, by any contemplation, be in furtherance of an illegal purpose. They point to the fact that there must be clear evidence of fraud or crime to warrant the lifting of the privilege. The tort of conspiracy, which at the highest, they maintain is all the defendant can hope to show, is insufficient to warrant the lifting of the privilege.

[33] That is indeed the law and they may well be right. But the issue here is whether it is permissible or indeed prudent for this court to come to that conclusion *via* this application. The proper forum and time for this contention to be taken, it seems to me, is at trial.

[34] It is clear from the facts and chronology of events I have enumerated above, that the most material witness to ascertain whether or not the 2nd email was in furtherance of an illegal purpose is the solicitor. The requirement of 'materiality' of the witness is therefore satisfied.

[35] It appears to this court that the most appropriate course to adopt would be for the solicitor to attend as a witness pursuant to the subpoena and to invoke the privilege under s. 126 of the Evidence Act 1950, at that stage. It would then be open to the parties to take up the arguments now set out and for the court to make a determination then. The court might well allow or disallow certain questions in order that it may determine the legality or otherwise of the 2nd email. The court will then be in a position to make a ruling on the matter more fully.

[36] It also falls to be considered whether the calling of the solicitor as a witness amounts to an abuse of process or amounts to oppressive conduct. I fail to see how this is so when the firm of LHAG will continue to act for the plaintiff. As pointed out at the outset, the calling of the solicitor as a witness in no way precludes LHAG from continuing to act for the plaintiff.

[37] In summary it appears to this court that:

(a) The primary issue in this case in relation to the confidentiality of the email turns on whether or not the proviso to s. 126 EA is applicable;

(b) The solicitor is the material witness for the purposes of the determination of this issue. As such the materiality requirement as set out in *Wong Sin Chong v. Bhagwan Singh* (above) is satisfied;

(c) The issue of whether or not the proviso is applicable ought not to be dealt with at this interlocutory stage in a summary fashion on the basis of conflicting affidavits, but at trial;

(d) Section 126 EA envisages the taking up of the issue legal privilege at or during trial. It is not an issue that is normally litigated or dealt with on affidavit evidence (see s. 2 EA). If the court were to make a finding that the proviso is inapplicable on the basis of affidavits, the court would be effectively conducting a mini trial on affidavit evidence, which flouts the EA. The proper course would be for the

subpoenaed witness to invoke the privilege afforded by the section at trial. (See also *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor.* [2009] 3 CLJ 405 where PW1, a solicitor, took the stand and invoked the privilege at trial successfully.);

(e) If the court were to allow this application to set aside the subpoena, the court would effectively be adjudicating on the issue of the proviso prior to trial. Certainly in so far as the 2nd email is concerned, there would be nothing left to be adjudicated at trial. This too would amount to a breach of natural justice;

(f) In view of the fact that the evidence of the solicitor would be material *vis a vis* the 2nd email, it cannot be concluded that the issuance of the subpoena was effected to oppress. Neither can it be viewed as an abuse which needs to be prohibited.

[38] For the reasons cited above, I conclude that the application to set aside the subpoena ought to be dismissed and I so order.

[39] It was brought to my notice during the hearing of this application that based on this decision, the parties may well determine the fate of two other subpoenas against two recipients of the 2nd email, namely G. Vijay Kumar and Rosli Dahlan who are also solicitors in LHAG. Although there is no application before me at present, I should point out that as they are not makers of the 2nd email, merely recipients, the reasoning I have adopted here will not necessarily be relevant in their case. In this context it is relevant that the evidence of the solicitor in relation to the proviso to s. 126 is relevant to determine the applicability of the privilege and thereby determine the confidentiality or otherwise of the 2nd email which is the subject matter of this action. This action does not deal with the tort of conspiracy to injure etc. That was the subject matter of the 2nd suit which has been struck out. Accordingly as the recipients are not makers of the 2nd email their evidence would not necessarily be relevant for the purposes of ascertaining the confidentiality or otherwise of the 2nd email. If materiality is not shown it does not follow that they are relevant or necessary witnesses for the matters in issue in this trial.

Enclosure 41 is dismissed.